☐ **EXPEDITE** (if filing within 5 court days of hearing)

☒ Hearing is set:
Date: July 18, 2003
Time: 1:30 p.m.
Judge/Calendar: The Honorable Paula Casey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

PREMERA, a Washington non-profit miscellaneous corporation; and PREMERA BLUE CROSS, a Washington non-profit corporation, Petitioners, v. MIKE KREIDLER, Insurance Commissioner for the State of Washington, Respondent.	No. 03-2-00112-8 PETITIONER'S REPLY BRIEF

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INTRODUCTION

PREMERA and Premera Blue Cross (collectively, "Premera") established in their opening brief that the Commissioner's Third Order violates the Holding Company Acts in two key respects. First, it disregards the required content of a Form A statement and the standards for judging the completeness of that statement. Second, it flouts the requirement that the Commissioner complete his review of the Form A statement and make a decision within 60 days. The Commissioner's Response Brief ("Response") fails to address either point squarely. Instead, the Response argues that the Third Order cannot be reviewed and that, even if it is subject to review, Premera is not entitled to relief. These arguments lack substance. The Third Order exceeds the Commissioner's authority; this Court has the power under the APA to review it; and this Court can grant effective relief.

ARGUMENT

I. The Content of the Form A Statement, Which Is Prescribed by Law, Does Not Include Materials Obtained in the Course of the OIC Staff Investigation.

A. The Law Specifies the Content of the Form A Statement.

The Response confuses the prescribed content of the Form A statement, spelled out in RCW 48.31C.030(2)(a)-(k), with Premera's answers to information requests. Such answers, although they may be relevant to the Commissioner's decision on whether to approve the proposed reorganization, are not part of the Form A Statement. The Response thereby repeats a key error in the Third Order.

As the Response acknowledges (at 4-5), a Form A statement must contain certain information, such as the identity of the insurer being acquired and the method of acquisition, the identity and background of the acquiring party, and the

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source and amount of consideration.[1] The Response slips from this undisputed base to the erroneous assertion that the Form A statement must also contain all other information that could be relevant to the Commissioner's review.[2] Such an assertion reflects a fundamental misreading of the Holding Company Acts. The content of the Form A statement is specified in RCW 48.31C.030(2). By contrast, the standards by which the Commissioner must determine whether or not to approve a proposed transaction are set forth in RCW 48.31C.030(5)(a).

Having received a Form A statement, the OIC has authority to investigate the applicant—i.e., to conduct an examination under RCW 48.31C.070.[3] That is precisely what happened here. (R. 000096). The OIC's examination authority provides the basis for the information requests submitted to Premera by the OIC Staff and consultants. That some of these requests remained outstanding at the time of the Third Order has nothing to do with whether Premera's Form A statement was complete. The Response is simply wrong in asserting that "[i]t is within the Commissioner's discretion . . . to determine that the filing will not be considered complete without the expert information that Premera has represented it will be providing." Response at 17.

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[1] Additional information may be required only through a rule-making process, RCW 48.31C.030(2)(*l*), which has not occurred here.

[2] For example, the Response wrongly states as a "Fact" that the Form A must supply information necessary for the Commissioner to determine whether the acquisition would substantially lessen competition or tend to create a monopoly in the health care coverage business. Response at 5. The language quoted in the Response relates not to the content of the Form A statement specified in RCW 48.31C.030(2), but rather to the standards that the Commissioner is obliged to apply in deciding whether or not to approve a proposed acquisition.

[3] Oddly, the Response claims (at 13) that Premera would limit the OIC Staff's investigation to "traditional civil discovery tools." On the contrary, Premera recognizes that the OIC Staff is entitled to gather information and documents pursuant to an examination under RCW 48.31C.070 and RCW 48.44.145. *See* Opening Br. at 10 n.9.

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An application for governmental approval, such as a Form A statement, does not encompass all of the information the State might consider in deciding whether or not to approve that application. Common sense says this; so do the Holding Company Acts, which draw a clear line between what must be included in a Form A statement and what may be considered in reviewing it, such as expert reports and evidence adduced at an adjudicative hearing. Premera has supplied tens of thousands of pages of documents and gigabytes of electronic information to the OIC consultants. Such information is intended to assist in their review, not to complete the prescribed Form A statement. The fact that the OIC Staff is conducting an exhaustive investigation is not material to whether Premera's Form A statement contains the information prescribed by law.

B. The OIC Staff Is Not Authorized to Determine Whether Premera's Form A Statement Is Complete.

The Response asserts that "the OIC Staff who have been delegated the responsibility to review the Form A filing may request additional information from the applicant to complete the Form A." Response at 5. It is the Commissioner, not the OIC Staff, who is authorized to declare the Form A statement complete or, if he declares it incomplete, to request additional information, just as it is the Commissioner who has the authority to conduct a hearing and approve the transaction. RCW 48.31C.030(4).

Those staff members who are reviewing Premera's application in order to prepare a recommendation to the Commissioner cannot and do not possess the authority to decide whether the Form A statement is complete or to act as the Commissioner's agents, because the Commissioner has erected a wall that precludes *ex parte* communication between them and the Commissioner. *See*

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RCW 34.05.458, .455. As the Response notes, "[t]he review function of the staff and the decisionmaking function of the Commissioner must be separate." Response at 15. The First Order, after declaring "a separation of functions," held that the OIC Staff, like Premera, was simply a party to the adjudicative proceeding. First Order at 3-4 (R. 000033-34). The OIC Staff cannot simultaneously act as a party and as the spokesperson for the decision maker. Having walled himself off from the OIC Staff, the Commissioner must make any determination of completeness or incompleteness independently.[4]

II. The Commissioner May Not Arbitrarily Rule That Premera's Form A Statement Is Incomplete.

The Response suggests that the Commissioner has unbridled "discretion" to declare when a Form A Statement is complete. Response at 13. To the contrary, a Form A statement is "deemed complete" 60 days after receipt by the Commissioner, unless the Commissioner declares it to be incomplete and notifies the applicant with specificity of additional information required to make the filing complete. In that case, the 60-day clock is tolled until 15 days after the Commissioner receives the additional information. RCW 48.31C.030(4). The Response wholly fails to address the argument that Premera's Form A statement is deemed complete and that the Third Order was ineffective as a declaration of incompleteness.

[4] The Response (at 5) incorrectly relies upon RCW 48.02.100 to suggest that the Commissioner may delegate decisionmaking responsibility to the OIC Staff in this case. Although the Commissioner has identified certain persons to assist and advise him in his decisionmaking role, he has applied the *ex parte* rule to prohibit communications between these few advisors and the members of the OIC Staff who are conducting the examination of Premera. *See* First Order at 3 (R. 000033).

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A. The Form A Statement Was Complete before the Third Order Issued.

By the time that the Commissioner issued the Third Order, Premera's Form A Statement was "deemed complete" by operation of law. There is no dispute as to the facts that compel this conclusion. Premera filed its initial Form A Statement with the OIC on September 17, 2002. *See* Response at 7. On October 7, 2002, the Deputy Commissioner, acting on the Commissioner's behalf, sent Premera an email listing additional exhibits and information necessary to make the filing complete.[5] In response, Premera supplemented its filing on October 25, 2002. *Id.*

The 60-day "deemed complete" period began on September 17, 2002, the date of Premera's initial filing. The Commissioner's request for additional information on October 7 tolled the 60-day clock until 15 days after the additional information was received on October 25, or until November 9. Premera's Form A Statement was thus deemed complete by operation of law on December 19, 2002.[6]

B. Failure to Identify Missing Information with Specificity Fatally Undermines Any Attempted Declaration of Incompleteness.

Under the law, the Commissioner may not simply declare that an application is "incomplete" or request more "information," as the Response argues. If the Commissioner declares a Form A statement incomplete and requests additional information, he must "promptly notify the [applicant] of the filing deficiencies and

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[5] The Deputy Commissioner's October 7, 2002, email preceded the separation of functions created in the First Order. Hence, the Deputy Commissioner could then act for the Commissioner in identifying information needed to the make the Form A complete.

[6] The OIC Staff's so-called "deficiency letter" dated November 19, 2002 (Response at 8) did not and could not constitute a declaration by the Commissioner. It was submitted after the Commissioner, in his First Order, declared a separation of the OIC's decision-making and investigative functions. Hence, it did not toll the running of the 60-day "deemed complete" period.

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shall set forth with specificity the additional information required to make the filing complete." RCW 48.31C.030(4) (emphasis added). The Third Order fails this test.

The Response does not attempt to defend the Third Order as a specific enumeration of missing information. Instead, the Response argues that the declaration of incompleteness in the Third Order was based on evidence that Premera had not yet responded to all of the OIC Staff's data requests. Response at 14.[7] Yet even if Premera's responses to data requests were material to the completeness of the Form A statement, which they were not, the Third Order failed to "set forth with specificity the additional information required to make the filing complete." RCW 48.31C.030(4) (emphasis added). Instead, the Third Order tied the determination of whether the Form A was complete to Premera's prospective answers to future "questions or problems" that the OIC Staff and consultants might raise. Third Order at 7 (R. 000252). Because the Third Order did not identify, with specificity, the additional information necessary to make Premera's filing complete, it did not constitute a valid declaration of incompleteness, and Premera's Form A statement was deemed complete by operation of law.

III. The Commissioner Is Bound by the Timelines in the Holding Company Acts.

In its Opening Brief, Premera explained that the word "shall" in a statute imposes a mandatory requirement absent legislative intent to the contrary, and that "discretion over the manner in which [an agency] carries out its statutorily

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[7] The Response asserts (at 14) that the OIC Staff's requests were "in writing, specific, and detailed." To the contrary, they were notably non-specific. For example, the OIC Staff's November 19, 2002, letter demanded "[a]ll of the documents and information requested by the consultants" (R. 000093) and warned that supplementary documents and their review "may identify other documents or information necessary for our review." (R.000091)

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prescribed duties does not mean that the agency has the discretion to refuse to carry out those duties." *Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 510, 39 P.3d 961 (2002) (Alexander, C.J., concurring). Instead of addressing this argument, the Response repeats the conclusion in the Third Order that the Commissioner's duties should be deemed "directory." Response at 18-19.

The Response misses the point. Statutory requirements, even if directory, may not be ignored. Even if the Commissioner does not lose jurisdiction over these proceedings by failing to comply with the 60-day timeframe, the Court is empowered to order him to comply with the statutory timeframes. *See* RCW 34.05.574(1)(b); Opening Br. at 21-22; *cf. Sunset Drive Corp. v. City of Redlands*, 73 Cal. App. 4th 215, 223, 86 Cal. Rptr. 2d 209, 215 (1999) (directory time limits may be enforced by writ of mandate compelling agency to act).

The Response also argues that interpreting the Holding Company Acts in accord with their language, purpose, and legislative history would lead to absurd results. According to the Response, the Legislature could not have intended that a hearing occur within the 60-day review period, because that is not enough time to review the Form A statement, hold a hearing, and reach a decision that addresses the relevant criteria, especially if there are interveners. Response at 17-18.

The Response concedes, however, that under the Model Act the hearing must occur not later than 30 days after the Form A is filed. *Id.* at 18 n.3. The Model Act establishes criteria for approving a change in control that are substantively identical to the criteria that the Commissioner must consider under the Holding Company Acts; it also provides for participation by interveners. *Compare* Model Act § 3(D)(1)-(2), *with* RCW 48.31C.030(4)-(5) *and* RCW 48.31B.015(4)(a)-(b). Thus, far from being "absurd," the 60-day review period

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reflects the legislative conclusion that review by the Commissioner of a change in control must focus on relevant considerations and must proceed expeditiously.

The Response also suggests that the Model Act should not be considered because the Holding Company Acts differ from the Model Act. Response at 18 n.3. That argument ignores the extensive legislative history demonstrating the Legislature's desire to conform to NAIC's regulatory standards. Differences that the Response highlights are irrelevant here. For instance, under both Acts, the Commissioner must make a decision within 60 days after the Form A is filed, but under the Model Act, the hearing must begin no later than day 30, whereas under the Washington Acts, the hearing could be held later in the 60-day review period. *Compare* Model Act § 3(D)(2), *with* RCW 48.31C.030(4) *and* RCW 48.31B.015(4)(b). This variation does not alter the requirement that review must be completed by the 60th day.

IV. The Third Order Is Subject to Judicial Review.

A. The Third Order Is Reviewable under RCW 34.05.570(3).

The Response mistakenly argues that the Third Order is not sufficiently final to justify judicial review under RCW 34.05.570(3). Response at 11-12.[8] RCW 34.05.570(3) provides for judicial review of "agency orders in adjudicative proceedings." The term "order" means "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." RCW 34.05.010(11)(a).

The Third Order finally determines Premera's legal rights and interests. When the 60-day deadline imposed by the Holding Company Acts passed,

[8] Surprisingly, the Response suggests (at 12) that that this matter is in "the preliminary stages." In fact, the OIC's investigation has been going on for more than eight months.

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Premera's statutory right to a timely adjudication was irrevocably lost. More than eight months have elapsed, during which Premera has paid over $6 million for the OIC Staff's ongoing investigation. Meanwhile, Premera has been unable to move forward with its plan for reorganization. As a legal matter, the Third Order reflects the Commissioner's final ruling on the portions of the Holding Company Acts that set forth (1) the required content of a Form A statement and the standards by which the Commissioner must determine whether it is complete, and (2) the starting point for the 60-day timeframe during which the Commissioner must complete his review and make a decision on the Form A statement.

No Washington cases explain which orders are subject to review under RCW 34.05.570(3), but cases from another jurisdiction are instructive. North Dakota has a virtually identical provision regarding reviewability of administrative orders,[9] and the North Dakota Supreme Court has held that analogous orders are subject to judicial review. In *Gross v. North Dakota Department of Human Services*, 652 N.W.2d 354 (N.D. 2002), the Department of Human Services had issued an order that imposed increased procedural burdens on a Medicaid recipient. *Id.* at 355-56. The agency argued that the order was not final for purposes of review because the burdens it imposed were "time limited" and did not affect any "substantive" privileges. *Id.* at 356. The court rejected that argument, holding that the order was final for purposes of review because it established a procedural

[9] The North Dakota Administrative Agencies Practice Act, N.D.CENT.CODE § 28-32-42(3)(a), authorizes appeals from "final orders" of administrative entities, and defines the term "order" as an agency action that "determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons." *Id.* § 28-32-01(7); *Gross*, 652 N.W.2d at 356.

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burden that was different than the burden imposed on others. *Id.* at 357.[10] Here, similarly, the Third Order creates a process fundamentally different from that recognized in at least six other Holding Company Acts proceedings. *See* Opening Br. at 9 n.7.

The authority cited in the Response is inapposite. The Response lists three cases in which the court construed a now-repealed section of the APA. *See Dep't of Ecol. v. City of Kirkland*, 84 Wn.2d 25, 29, 523 P.2d 1181 (1974) (construing former RCW 34.04.130); *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 99-100, 586 P.2d 1173 (1978) (same); *Renton Educ. Ass'n v. Public Empl. Relations Ass'n*, 24 Wn. App. 476, 478-80, 603 P.2d 1271 (1979) (same). That provision required that an order constitute a "final decision" before it could be reviewed. *Dep't of Ecol.*, 84 Wn.2d at 29. The current review provision for adjudicative orders does not require a "final decision." *See* RCW 34.05.570(3).

Moreover, the cases cited by the Commissioner demonstrate that "finality" does not depend "upon the label affixed to its action by the administrative agency, but rather upon a realistic appraisal of the consequences of such action." *Dep't of Ecol.* 84 Wn.2d at 29 (emphasis added). Thus, even under the stricter (and inapplicable) standard at issue in those cases, courts were instructed to review "administrative rulings which attach legal consequences," even though the actions were "taken in advance of other hearings and adjudications that may follow," so as to avoid irreparable injury. *Id.* at 30.

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[10] *See also Raboin v. N.D. Dep't of Human Servs.*, 552 N.W.2d 329, 333 (N.D. 1996) (holding that a finding of probable cause that parents had committed child abuse was sufficiently final to justify judicial review because the order "create[d] consequences" affecting the petitioner's legal rights).

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Premera has already suffered—and continues to suffer—irreparable injury. Premera's right to a hearing within the statutory timeframe is already lost, and a prompt decision on its application is months overdue. Premera has suffered millions of dollars in financial harm, and its plan to reorganize the company has been on hold for months. Deferring judicial review until the Commissioner enters his final decision would only exacerbate the harm Premera has already incurred. Under any definition of "finality," immediate review of the Third Order is warranted.

B. The Third Order Is Reviewable under RCW 34.05.570(4).

Even if review were not available under RCW 34.05.570(3), this Court could review the Third Order under RCW 34.05.570(4). Subsection (4) applies to "[a]ll agency action not reviewable under subsection (2) or (3) of this section." RCW 34.05.570(4)(a).[11] Subsection (4) instructs courts to grant relief to persons aggrieved by agency action that is "[a]rbitrary and capricious," or "[o]utside the statutory authority of the agency or the authority conferred by a provision of law." RCW 34.05.570(4)(c). The Third Order suffers from both infirmities.

An agency action is arbitrary and capricious if it is "based on erroneous interpretation of the statutes." *Children's Hosp. & Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 873-74, 975 P.2d 567 (1999); *cf. Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 95, 982 P.2d 1179 (1999) (holding that the agency acted arbitrarily and capriciously when it "acknowledged that its decision

[11] Thus, even if the Third Order is not an "order" for purposes of the APA because it does not "finally" determine Premera's legal rights, duties, etc. (RCW 34.05.010(11)(a)), the Third Order is indisputably an agency action and hence reviewable under RCW 34.05.570(4).

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was inconsistent with state law"). Because the Third Order relies on an erroneous interpretation of the Holding Company Acts, it is arbitrary and capricious.

The Third Order is also outside the Commissioner's statutory authority. In evaluating Premera's Form A statement, the Commissioner has only the authority granted by the Holding Company Acts. *See Rios*, 145 Wn.2d at 510 (Alexander, C.J., concurring) (an agency's discretion "is limited to the terms of the statutory scheme that provides the agency its authority"). The Acts set forth the content of a Form A statement and establish a strict procedure for requesting additional information. They also impose a 60-day timeframe for review of the Form A statement, including any adjudicative hearing.[12] By disregarding these requirements, the Commissioner acted outside the statutory authority of his agency.

V. This Court Has the Power to Grant Premera Effective Relief.

The Response argues that the relief requested by Premera cannot be granted under the APA. Response at 19-22. This argument is simply wrong. RCW 34.05.574(1) provides:

> In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.

Although the Response claims (at 21) that declaratory relief is not "appropriate" under RCW 34.04.570(3), the APA expressly permits the court to enter a "declaratory judgment order" under RCW 34.05.570. RCW 34.05.574(1)(b). The Response also argues that "mandamus-like" relief is available only under a petition brought under RCW 34.05.570(4)(b). Response at

[12] *See* Opening Br. at 7-11, 13-19.

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21. Again, this is incorrect: the Court may "order an agency to take action required by law" under RCW 34.05.570. RCW 34.05.574(1)(b); *see also Rios*, 145 Wn.2d at 508 (noting the "array of options" available to a court reviewing "agency action").

Similarly, the Response contends that the Court cannot remand with instructions to the agency on how to change an unlawful order. Response at 21-22. To the contrary, the Court may "remand the matter for further proceedings," including a remand "for modification of agency action." RCW 34.05.574(1)(b); *see also Skokomish Indian Tribe*, 97 Wn. App. 84 (finding agency action arbitrary and capricious and remanding with specific instructions as to the factors that must inform the agency action on remand).

In support of the assertion that remand with specific instructions is improper, the Response cites *Skold v. Johnson*, 29 Wn. App. 541, 630 P.2d 456 (1981). Response at 21. In *Skold*, the trial court modified an order by deleting and rewriting portions of it. 29 Wn. App. at 549 & n.5. While noting that a reviewing court could not itself modify an agency order, the Court of Appeals concluded: "A court may, however, remand a case for further proceedings where no grounds for reversal are necessarily present, but the court, based upon its review of the record, is not satisfied that the agency is right, and a 'second look' is required." *Id.* at 549-550.

Here, Premera properly requests the Court to remand the Third Order for a "second look," with instructions to the Commissioner to apply the statutory standard for completeness of the Form A statement and the statutory timeframe for rendering a decision. *See Skokomish Indian Tribe*, 97 Wn. App. at 97 (remanding with specific instruction that agency take action in compliance with state law).

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Such instructions would not usurp the discretion of the Commissioner, but rather would ensure that the Commissioner exercises only that discretion actually granted to him. *See Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 395, 687 P.2d 195 (1984) (remanding to agency for further action because of agency's "incorrect interpretation of the law").

Finally, the Response ignores the reality of the harm suffered by Premera when it argues that relief is not available because Premera has not been "substantially prejudiced." Response at 19-21. As the record reflects, the delays caused by the Commissioner's failure to comply with the statutory deadlines have created severe harm to Premera and more than satisfy the "substantial prejudice" requirement. *See Children's Hosp.*, 95 Wn. App. at 874 (Children's Hospital was substantially prejudiced by economic injury resulting from agency's ruling).

Under the Holding Company Acts, Premera is required to pay the costs of the OIC's review of the proposed reorganization. RCW 48.31C.030(5)(b). As that review has dragged on, and its proposed reorganization indefinitely delayed, Premera has paid millions of dollars to the OIC Staff consultants. Neither the Commissioner nor the OIC Staff has timely imposed deadlines on the experts. At the November 26, 2002, hearing on its motion for reconsideration, Premera urged the Commissioner to schedule a cut-off date for expert reports:

> We believe that the schedule needs to drive the experts, not the experts deciding the schedule, for two reasons: One, they're experts; they'll always want more time to mull things over. Two, it is in their financial interests to take more time. This is an open-ended process, and there needs to be some control.

(R. 000230-231). When the Commissioner asked the OIC Staff at the November hearing when expert testimony would be available, the OIC Staff lawyer admitted that OIC Staff had no "specific date where we could anticipate that the experts or

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consultants would be able to have fully evaluated the materials that they have reviewed to the point where they would be able to prepare a draft opinion or recommendation." (R. 000223). The Commissioner did not impose any deadline for completion of the consultants' reports, as would be necessary if he were going to render a decision within the time allowed by law. In consequence, the consultants' investigation has been prolonged indefinitely at Premera's expense.

CONCLUSION

Rather than address the errors of law manifest in the Third Order, the Response simply argues that the Third Order was appropriate because the investigation and examination by the OIC Staff and its consultants were ongoing. Continuing investigation does not excuse the Commissioner's failure to apply the statutory standards that govern the completeness of Premera's Form A statement. Nor can it justify flouting the statutory requirement that he must hold any hearing and make a decision within 60 days. For these reasons, Premera urges the Court to grant the relief requested.

DATED this 3rd day of July, 2003.

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The Honorable Paula Casey

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Petitioners,

v.

MIKE KREIDLER, Insurance Commissioner for the State of Washington,

Respondent.

No. 03-2-00112-8

CERTIFICATE OF SERVICE

I, Joseph Smalls, certify that I served a copy of the following document

PETITIONER'S REPLY BRIEF

on all parties or their counsel of record on the date below as follows:

Service To:	**Service Perfected By:**
Christina E. Beusch Deputy Attorney General Office of the Attorney General 1125 Washington Street SE Olympia, WA 98504-0100	[ ] By United States Mail [X] By Legal Messenger Service [ ] By Hand Delivery [ ] By Facsimile [ ] By E-Mail

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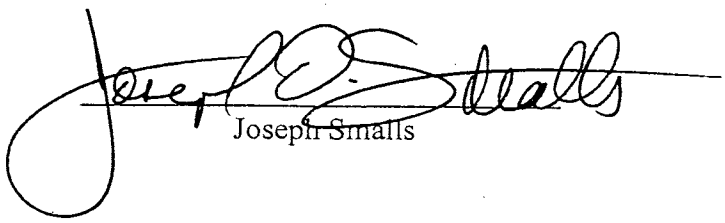
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of July, 2003.



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